U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: NOV 12 2013 Office: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)(A)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification for the beneficiary as a member of the professions holding an advanced degree, pursuant to section 203(b)(2)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2)(A). The petitioner further asserts that the beneficiary qualifies for blanket labor certification pursuant to 20 C.F.R. § 656.5, Schedule A, Group II.

The director found that "the beneficiary is a member of the professions holding an advanced degree" and the evidence in the record supports that finding. However, the director also found that the petitioner had not established that the beneficiary is "eligible for certification under Schedule A."

On May 29, 2013, in accordance with the regulation at 8 C.F.R. § 103.2(b)(16)(i), the AAO issued a notice advising the petitioner of derogatory information indicating, in part, that although the petitioner indicated that the beneficiary did not have an ownership interest in the petitioning entity, the beneficiary appeared to be "an equal partner in the personal service corporation." The notice specifically stated that the petitioner "signed the Form I-140 petition under penalty of perjury that the petition and the evidence submitted with it... are all true and correct." In response to the notice of derogatory findings, the petitioner submitted sufficient evidence to overcome this finding. The notice also informed the petitioner of deficiencies in the notice of filing which will be discussed in this decision.

On appeal, counsel submits a brief and additional evidence. The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). For the reasons discussed below, upon review of the entire record, the petitioner has not established the beneficiary's eligibility for the classification sought.

I. SCHEDULE A, GROUP II DESIGNATION

(a) Law

The regulation at 20 C.F.R. § 656.15(d)(1) provides, in pertinent part:

> An employer seeking labor certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the *widespread acclaim and international recognition* accorded the alien by recognized experts in the alien's field; and *documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability*. In addition, the employer must file documentation about the alien from at least two of the following seven groups:

(i) Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought;

(ii) Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields;

(iii) Published material in professional publications about the alien, about the alien's work in the field for which certification is sought, which shall include the title, date and author of such published material;

(iv) Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought;

(v) Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought;

(vi) Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation;

(vii) Evidence of the display of the alien's work, in the field for which certification is sought, at artistic exhibitions in more than one country.

(Emphasis added.)

Where the petitioner fails to submit the requisite evidence, the proper conclusion is that the petitioner failed to satisfy the regulatory requirement regarding evidence. *See Kazarian v. USCIS*, 596 F.3d 1115, 1122 (9th Cir. March 4, 2010). While involving a different classification than the one at issue in this matter, the similarity of the two classifications makes the court's reasoning in *Kazarian* persuasive to the classification sought in this matter. Specifically, the regulations state a regulatory standard and provide a list of suggested types of evidence, of which the petitioner must submit a certain number. Significantly, USCIS may not unilaterally impose novel substantive or evidentiary requirements beyond those set forth at 8 C.F.R. § 204.5. *Kazarian,* 596 F.3d at 1221, *citing Love Korean Church v. Chertoff,* 549 F.3d 749, 758 (9th Cir.2008). Thus, if the regulatory standard is to have any meaning, USCIS must be able to evaluate the quality of the evidence in a final merits determination. If the petitioner has submitted the requisite evidence, USCIS makes a final merits determination as to whether the evidence demonstrates the "widespread acclaim and

international recognition accorded the alien by recognized experts in the alien's field." 20 C.F.R. § 656.15(d)(1); *see also Kazarian,* 596 F.3d at 1119-20.

The *Kazarian* court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at 1122 (citing to 8 C.F.R. § 204.5(h)(3)).

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination. When the Department of Labor adjudicated Schedule A Group II filings, the Board of Alien Labor Certification Appeals (BALCA) concluded that the ultimate fact to be proven is that the alien has exceptional ability; and that the various kinds of documentation mentioned in the regulation are suggested as possible methods of proof. *Matter of Allied Concert Services, Inc.*, 88-INA-14 (BALCA 1988). The AAO will first review the evidence under the plain language requirements of each criterion claimed.

(b) Analysis

While the use of comparable evidence is permitted under different classifications, there is no regulatory provision that would allow the use of comparable evidence to satisfy the evidentiary requirements for Schedule A, Group II. Therefore, the AAO will review the evidence under the plain language requirements of each criterion claimed.

(i) Evidentiary Criteria[1]

Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought

The petitioner initially submitted evidence under this criterion, but does not address it on appeal. Thus, the petitioner has abandoned any claims regarding this criterion. *Sepulveda v. U.S. Att'y Gen.,* 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *see also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

[1] The petitioner does not claim to meet or submit evidence relating to the regulatory categories of evidence not discussed in this decision.

Documentation of the alien's membership in international associations, in the field for which certification is sought, which require outstanding achievement of their members, as judged by recognized international experts in their disciplines or fields

The petitioner initially submitted evidence under this criterion, but does not address it on appeal. Thus, the petitioner has abandoned any claims regarding this criterion. *Id.*

Published material in professional publications about the alien, about the alien's work in the field for which certification is sought, which shall include the title, date and author of such published material

The petitioner initially submitted evidence under this criterion, but does not address it on appeal. Thus, the petitioner has abandoned any claims regarding this criterion. *Id.*

Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought

While the directordetermined that the beneficiary did not meet this criterion, the record contains sufficient documentary evidence that the beneficiary meets this criterion as a manuscript reviewer.

Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought

On appeal, counsel asserts that the beneficiary's original contributions are evidenced by his "publications in major scholarly journals and invitations to present his research findings at professional medical conferences throughout North America." While the beneficiary has co-authored several articles and co-presented at a number of conferences, the regulations contain a separate criterion regarding the authorship of scientific or scholarly articles. 20 C.F.R. § 656.15(d)(1)(vi). If the regulations are to be interpreted with any logic, it must be presumed that the regulation views contributions as a separate evidentiary requirement from scholarly articles.[2] Furthermore, contrary to counsel's assertions on appeal, the simple fact that the beneficiary's findings have been published and presented at conferences does not create a presumption that the findings, upon dissemination in the field, impacted the field at a level consistent with original contributions of major significance.

[2] Publication and presentations are not sufficient evidence under 8 C.F.R. § 204.5(h)(3)(v) absent evidence that they were of "*major* significance." *Kazarian v. USCIS*, 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010). In 2010, the *Kazarian* court reaffirmed its holding that the AAO did not abuse its discretion in finding that the alien had not demonstrated contributions of major significance. 596 F.3d at 1122.

The record also contains letters of recommendation from the beneficiary's colleagues. In general, the letters praise the beneficiary's skills, research findings and surgical techniques. According to the regulation at 20 C.F.R. § 656.15(d)(1)(v), an alien's contributions must be not only original but of major significance. The AAO must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *quoted in APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003). To be considered a contribution of major significance "in the field" of orthopedic medicine, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the beneficiary's work.

Dr. [redacted] the beneficiary's mentor at [redacted] states that beneficiary's work is novel and shows that sports medicine needs "to make changes to our surgical techniques." He also states that the beneficiary's "research identif[ied] the alternative of medial opening wedge high tibial osteotomy as a viable alternative to a total knee replacement in elderly patients with isolated medial compartment osteoarthritis."

Dr. [redacted] the beneficiary's mentor during his residency at the [redacted] states that the beneficiary's "investigations are novel and have brought insight to the field for all Orthopedic Surgeons."

Dr. [redacted] the beneficiary's mentor at [redacted] states that the beneficiary "has made contributions" to the "three basic facets to a surgeon scientist: clinical patient care, education of other surgeons, and clinical and basic science research." He also states that one of the beneficiary's techniques "will allow future research to be published in a shorter time period."

In response to the director's request for evidence, Dr. [redacted] a partner at [redacted] where the beneficiary was a visiting fellow, also states that the beneficiary "has made contributions" to the "three basic facets to a surgeon scientist; clinical patient care, education of other surgeons, and clinical and basic science research." In fact, except for the information about the author, the letter is identical to the letter written by Dr. [redacted] suggesting the language in the letters is not the authors' own. *Cf. Surinder Singh v. Board of Immigration Appeals*, 438 F.3d 145, 148 (2d Cir. 2006) (upholding an immigration judge's adverse credibility determination in asylum proceedings based in part on the similarity of some of the affidavits); *Mei Chai Ye v. U.S. Dept. of Justice*, 489 F.3d 517, 519 (2d Cir. 2007) (concluding that an immigration judge may reasonably infer that when an asylum applicant submits strikingly similar affidavits, the applicant is the common source).

While some of the letters identify the beneficiary's research results and conclude they are applicable to other work in the field or even constitute contributions to the field, the record lacks corroborating evidence, such as citations of the beneficiary's articles or letters from independent surgeons who are already employing the beneficiary's techniques or using the beneficiary's research as a basis for their own. Vague, solicited letters from local colleagues that do not specifically identify contributions or

provide specific examples of how those contributions influenced the field are insufficient. *Kazarian v. USCIS,* 580 F.3d 1030, 1036 (9th Cir. 2009) *aff'd in part* 596 F.3d 1115 (9th Cir. 2010).[3]

In light of the above, the petitioner has not submitted qualifying evidence that the beneficiary meets the plain language requirements of the criterion.

> *Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation*

The director found that the petitioner established that the beneficiary satisfies the plain language requirements of this criterion and the record supports that finding.

(ii) Final Merits Determination

The regulation at 20 C.F.R. § 656.15(d)(1) provides that "[a]n employer…must file documentary evidence showing the widespread acclaim and international recognition accorded the alien by recognized experts." The petitioner's evidence must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criteria at 20 C.F.R. § 656.15(d)(1)(i)-(vii), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with widespread acclaim and international recognition.

The beneficiary has peer-reviewed one manuscript. The four submitted reference letters were limited to the beneficiary's prior mentors/colleagues and two of the letters used identical language, which raises a question as to the authorship of the similar language. Furthermore, according to the letters, "[t]here are three basic facets to a surgeon scientist: clinical patient care, education of other surgeons, and clinical and basic science research." The evidence submitted demonstrates that the beneficiary is performing all three, but none of his accomplishments rise to the level of widespread acclaim and international recognition.

Furthermore, the regulation requires "documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability." As evidence, the petitioner submitted a letter from Chief Executive Officer of the petitioning company and evidence of the beneficiary's speaking and educational activities. Dr. letter only addresses his belief that the beneficiary is an alien of exceptional ability, not that the alien's work in the past year, or in the future, will require exceptional ability. As for the beneficiary's educational and speaking activities, there is no evidence that any of these activities require an alien of exceptional ability, rather than a competent professional.

[3] In 2010, the *Kazarian* court reiterated that the AAO's conclusion that "letters from physics professors attesting to [the alien's] contributions in the field" were insufficient was "consistent with the relevant regulatory language." 596 F.3d at 1122.

The conclusion the AAO reaches by considering the evidence to meet each category of evidence at 20 C.F.R. § 656.15(d)(1) separately is consistent with a review of the evidence in the aggregate. Ultimately, the evidence in the aggregate does not demonstrate the widespread acclaim and international recognition of the beneficiary.

The truth is to be determined not by the quantity of evidence alone, but by its quality. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010) citing *Matter of E-M-* 20 I&N Dec. 77, 80 (Comm'r 1989).

II. NOTICE OF FILING

The regulation at 20 C.F.R. § 656.15 provides, in pertinent part:

> (b) *General documentation requirements.* A Schedule A application must include:
>
> (1) An Application for Permanent Employment Certification form, which includes a prevailing wage determination in accordance with § 656.40 and § 656.41.
>
> (2) Evidence that notice of filing the Application for Permanent Employment Certification was provided to the bargaining representative or the employer's employees as prescribed in § 656.10(d).

The regulation at 20 C.F.R. § 656.10(d)(1) states that notice of the filing must be provided:

> (i) To the bargaining representative(s) (if any) of the employer's employees in the occupational classification for which certification of the job opportunity is sought in the employer's location(s) in the area of intended employment. Documentation may consist of a copy of the letter and a copy of the Application for Permanent Employment Certification form that was sent to the bargaining representative.
>
> (ii) If there is no such bargaining representative, by posted notice to the employer's employees at the facility or location of the employment. The notice must be posted for at least 10 consecutive business days. The notice must be clearly visible and unobstructed while posted and must be posted in conspicuous places where the employer's U.S. workers can readily read the posted notice on their way to or from their place of employment . . . In addition, the employer must publish the notice in any and all in-house media, whether electronic or printed, in accordance with the normal procedures used for the recruitment of similar positions in the employer's organization.

The methods vary by which a petitioner can be notified of evidentiary requirements. For example, a petitioner is considered to be on notice through the specific requirements outlined within the regulations, or through various forms of communication from USCIS to a petitioner or applicant

noting an evidentiary deficiency or requesting more evidence. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). The regulations at 20 C.F.R. §§ 656.10(d) notified the petitioner of the specific requirements regarding the notice of filing.

As previously mentioned, the May 29, 2013 notice informed the petitioner of deficiencies in the notice of filing. Specifically, the notice stated:

> The notice of filing submitted with the petition contains fields for "Date Posted," Date Removed," Locations Where the Notice Was Posted," "Means of In-House Notice, If applicable" and "Explanation of Any Lack of In-House Notice." None of the fields were completed and no evidence regarding in-house media was provided. The record does contain a printout from the employer's website which lists the job opportunity, but does not comply with the in-house media requirements. Furthermore, the regulation at 20 C.F.R. § 656.10(d)(3)(iii) requires that the notice "[p]rovide the address of the appropriate Certifying Officer." Finally, based upon the information in the record, the beneficiary will be performing part of his duties at [redacted] The record does not contain evidence that the notice of filing was posted at this location. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, at 145 (*de novo* authority of AAO well recognized by federal courts).

In response to the notice, counsel submitted a signed declaration from the Chief Executive Officer of the petitioning company stating that he had posted the notice, but failed to complete it and a newly completed notice of filing indicating that the notice had been posted at the petitioner's address.

The Department of Labor's PERM Frequently Asked Questions at http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#notefile6 under Notice of Filing state in pertinent part:

> Question 6: What address must the employer provide on the posted notice of filing?
>
> The employer must provide the address of the appropriate Certifying Officer for the area of intended employment. Addresses for the National Processing Centers and Certifying Officers, including a chart of the states and territories within their jurisdiction, can be found under the section, How to File, above.
>
> Question 7: For how long must the employer publish a notice of filing in the employer's in-house media?

If the employer normally recruits for similar positions in the employer's organization through in-house media, then the employer must publish the notice of filing in its in-house media in accordance with the employer's normal procedures for recruitment of similar positions or for 10 consecutive business days, whichever is of longer duration.

Question 12: Where must I post a Notice of Filing for a permanent labor certification for roving employees?

If the employer knows where the Schedule A employee will be placed, the employer must post the notice at that work-site(s) where the employee will perform the work and publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The prevailing wage indicated in the notice will be the wage applicable to the area of intended employment where the worksite is located.

Question 13: Does the language on the electronic in-house media Notice of Filing need to be exactly the same as the language on the physical in-house Notice of Filing?

The regulations require that the employer publish the notice internally using in-house media--whether electronic or print--in accordance with the normal internal procedures used by the employer to notify its employees of employment opportunities in the occupation in question. The language should give sufficient notice to interested persons of the employer's having filed an application for permanent employment labor certification for the relevant job opportunity. It is not required to mirror, word for word, the physical posting. In most cases, the physical posting language will be the most efficient way to electronically post the Notice of Filing; in others, the software program used to create the electronic in-house posting may be unable to accept all of the language used in the physical Notice of Filing. In every case, the Notice of Filing that is posted to the employer's in-house media must state the rate of pay and apprise the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer. If there is insufficient space to include the Certifying Officer's address, then information as to where the address can be found must be provided.

In response to the notice, counsel asserts that the petitioner complied with the notice of filing requirements because the notice was posted "at the principal place of employment" and "post[ed] on their website which is their 'normal procedure used for recruitment.'"

On the ETA Form 9141, Application for Prevailing Wage Determination, under Place of Employment, the question "Will work be performed in multiple worksites within an area of intended

employment or a location(s) other than the address listed above?" was marked "yes." Counsel does not address the issue of the beneficiary performing some of his duties at in response to the notice. In addition to failing to post the notice at the additional worksite, the in-house media posting did not include any information notifying "the reader that any person may provide documentary evidence bearing on the application to the Certifying Officer. If there is insufficient space to include the Certifying Officer's address, then information as to where the address can be found must be provided" and the record does not indicate how long the notice remained on the website. Finally, the notice of filing did not include "the address of the appropriate Certifying Officer," as required by 20 C.F.R. § 656.10(d)(3)(iii). For these reasons alone, the petition must be denied.

IV. CONCLUSION

The documentation submitted has not established that the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability, nor the widespread acclaim and international recognition accorded the alien by recognized experts in the alien's field. As a result, the alien cannot be found to qualify for exceptional ability under Schedule A, Group II designation. In addition, the notice of filing did not comply with the regulations. Thus, the petitioner has not established that the beneficiary is qualified for the benefit sought.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.